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Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

JIMMY L. ATES,
Petitioner,

v.

JAMES McDONOUGH, Secretary,
Department of Corrections, State of Florida,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the one year provision of 28 U.S.C. § 2244 is tolled ninety days for a state prisoner to seek certiorari review in the Supreme Court of the United States, an issue over which the circuits differ, particularly the Eleventh Circuit, *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005) and the Sixth Circuit, *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003).

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JIMMY L. ATES,
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JAMES McDONOUGH, Secretary,
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On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, JIMMY L. ATES, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 10 January 2006, rehearing denied 21 February 2006 being denial of a certificate of appealability.

D. CITATIONS TO OPINIONS BELOW

The state court opinion below is reported as *Ates v. State*, 768 So. 2d 446 (Fla. 1st DCA 2000). The federal rulings are unpublished, but are reprinted in the Appendix.

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the denial of a Certificate of Appealability, a final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on 12 January 2006 (Appendix, hereinafter "A," (A-9), rehearing denied 21 February 2006 (A-13) being a denial of certificability by a person in state custody. *See Hohn v. United States*, 524 U.S. 236 (1998).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS BELOW

1. Constitutional Provisions.

a. Amendment V:

No person shall be held to answer...nor shall be compelled in any criminal case to be a witness against himself ... .

b. Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right

... to have the Assistance of Counsel for his defense.

2. Statutory Provisions.

The applicable portion of Title 28 U.S.C. § 2244 reads:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

G. STATEMENT OF THE CASE

1. State Court Proceedings.

On 23 September 1998, a state court jury returned a verdict

of guilty on one count of first degree murder. The defendant was sentenced to life. After a direct appeal, the First District Court of Appeal *per curiam* affirmed Petitioner Ates' conviction and sentence. *See Ates v. State*, 768 So. 2d 446 (Fla. 1st DCA 2000). The mandate was issued by the court on 16 August 2000. On 31 July 2001, Petitioner Ates timely filed a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The state court denied the motion and Petitioner appealed to the First District Court of Appeal of Florida. On 15 September 2004 the District Court of Appeal *per curiam* affirmed the denial of post conviction relief and issued its mandate on 8 November 2004.

2. United States District Court.

Petitioner Ates then filed a federal habeas action pursuant to U.S.C. Title 28 § 2254 on 22 February 2005. The State responded on 27 June 2005 that the petition was untimely (Doc 18).[1] Petitioner responded that the petition was timely under the extended time provisions of *Clay v. United States*, 537 U.S. 522, 525-526 (2003). The United States Magistrate nevertheless recommended in his

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[1]Reference to docket entries United States District Court Northern District of Florida Case No. 3:05cv57-MCR/ET.

Report and Recommendation that the petition be dismissed. (Doc 21), which was adopted in the order of the United States District Court Judge (Doc 22). A timely notice of appeal was filed on 19 October 2005 (Doc 24), construed as a motion for Certificate of Appealability and denied by the United States District Court Judge 27 October 2005 (Doc 31).

3. Eleventh Circuit Court of Appeals.

Petitioner sought a Certificate of Appealability from the Eleventh Circuit Court of Appeals on or about 05 December 2005. The Eleventh Circuit, Case No. 05-15934-G (A-9), on 12 January 2006, rehearing denied 21 February 2006 (A-12), specially addressed the issue of whether a state prisoner in federal court is entitled to the additional ninety day period allowed for a petition for writ of certiorari to the United States Supreme Court. "Although appellant [Petitioner Ates] alleges that the limitations period should be tolled during the period in which he could have sought *certiorari* review from the United States Supreme Court regarding the denial of his state post-conviction motion, this Court has expressly rejected that argument. *See Lawrence v. Florida*, 421 F.3d 1221, 1225 (11th Cir. 2005)." (A-11). The Eleventh Circuit therefore denied the requested

Certificate of Appealability as "plainly barred by § 2254's one-year statute of limitations." (A-11).

H. REASONS FOR GRANTING THE WRIT

Controlling Eleventh Circuit precedent conflicts with controlling precedent of the Sixth Circuit on the same issue of law as to whether the one year statute of limitations for a state prisoner seeking federal habeas corpus relief is tolled an additional ninety days to allow for review to the Supreme Court of the United States; the United States Supreme Court should accept the case to resolve the conflict between the circuits as the issue, if unresolved, is capable of being repeated.

1. The position of the Sixth Circuit Court of Appeals.

The key issue decided in *Abela v. Martin*, 348 F.3d 164, 166, 167 (6th Cir. 2003), was whether the one-year statute of limitations applicable to federal habeas corpus petitions is also tolled during the period in which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of denial of the petitioner's state collateral relief motion. The Sixth Circuit held:

> Under § 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post conviction or other collateral relief until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

Id., at 172. In so holding, the court found that the distinction of whether petitioner has actually filed for certiorari or not is no longer tenable. *Id.* at 169. Citing *White v. Klitzki*, 281 F.3d 920 (9th Cir. 2002), the court adopted the reasoning in the dissent by Judge Berzon which states:

> While the application is one for state post conviction relief. Just as state criminal proceedings can raise federal issues reviewable in the United States Supreme Court, so can state habeas proceedings. A state criminal proceeding . . . is still "pending" even though the state courts are finished with it, until any petition filed is finally decided. Similarly, if there is a certiorari petition pending to review the validity of the state's denial of such an application for state post conviction review, the application is still "pending" – that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet.

Abela, supra, at 170. In other words, the Sixth Circuit decided that while the decision of the state court is still subject to review by a higher court the action is still "pending" for the purposes of § 2244(d)(2) tolling. The Sixth Circuit reasoned that a ruling to the contrary would be unreasonable.

> Furthermore, to require a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does

> not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief. This disposition would also raise concerns about comity and exhaustion.

Id. at 171. It is doubtful that Congress intended, in the Anti-terrorism and Effective Death Penalty Act, to force prisoners to choose between federal habeas relief and seeking certiorari to the Supreme Court, or to do both simultaneously. *Id.* When addressing the issue of whether or not the period for filing certiorari tolls the statute of limitations where no petition is actually filed the court held:

> Section 2244(d)(2), provides that the one-year statute of limitations is tolled while a properly filed application for state post-conviction relief is "pending," 28 U.S.C. § 2244(d)(2), but it offers no clue as to whether an application is "pending" during the ninety-day period for seeking Supreme Court review. If that determination depends on whether a petitioner ultimately applies for a writ of certiorari, then courts and litigants can never know whether the statute of limitations is running during the period following their state post-conviction review; that determination will depend on events that are to happen down the road.

Id. As the court properly notes a statute of limitations should be clear. At any given time courts and litigants should be able to determine whether a limitations period is running, tolled, or expired.

Id. at 172. Finally, the court held that:

> Because *Clay* explicitly holds that *federal* petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief, because *Carey* advances a broad definition of when a petition for state relief is "pending" under section 2244(d)(2), and because the contrary view leads to an unstable limitations scheme prone to subsequent revision, we hold that under section 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post conviction or other collateral relief until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

Id. at 172-173.

2. The conflicting position of the Eleventh Circuit Court of Appeals.

The Eleventh Circuit has held that a state court judgment becomes final upon issuance of the mandate on direct appeal. *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001). However, the statute is tolled at the time of direct appeal for the 90 day period in which a petitioner could appeal to the United States Supreme Court. *Kaufman v. United States*, 282 F.3d 1336 (11th Cir. 2002). The State argued below in the United States District Court that the 90 day period ran from the date the decision is rendered, not from the date

of the mandate, *citing Close v. United States*, 336 F.3d 1283, 1285 (11th Cir. 2003). The State argued that the holding in *Close* stated that under Supreme Court Rule 13 the date of the issuance of the mandate is irrelevant for determining when a certiorari petition can be filed, and therefore, irrelevant for determining finality under § 2254. Based on this reasoning, the State argued that the 90 day tolling period after the direct appeal ended on 30 October 2000 for Petitioner Ates. Counting from 30 October 2000 until the filing of the state post conviction order on 31 July 2001, the State argued that 274 days had expired on the one year time limitation on a federal habeas proceeding. Petitioner responded that the key issue in the determination of the timeliness of Petitioner Ates motion for post conviction relief pursuant to § 2254 was whether the statute of limitations tolling provision of 28 U.S.C. § 2244(d)(2) includes the time for seeking certiorari review by the United States Supreme Court following the denial of collateral relief in the state courts. In *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000), the Eleventh Circuit affirmed its holding in *Coates v. Byrd*, 211 F.3d 1[illegible] (11th Cir. 2000) which held that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial

of collateral relief in the state courts, is not to be subtracted from the running of time for U.S.C. § 2244(d)(1). Other circuits have been disagreed with this holding and Petitioner Ates requests the Court to review and consider the relevant circumstances of the conflict among the circuits.

3. The Petition of Petitioner Ates otherwise sufficiently stated substantial constitutional claims.

a. Violation of defendant's right to testify. *See Brown v. U.S.*, 125 Fed. App. 269, 2004 U.S. App. Lexis 28709 (11th Cir. No. 02-15187) (unpublished).

Petitioner's wife, Norma Jean Ates, was murdered in their home at approximately 6:30 p.m. on June 2, 1991. Six years later June 25, 1997, Petitioner/Appellant Ates, an ordained minister, was charged, by grand jury indictment, with first-degree murder in relation to her death.

Petitioner alleged below in pleadings in state and federal court that he wished to testify in his own behalf to dispute the charge against him and to show the jury that he had nothing to hide. However, defense counsel told Petitioner that he (defense counsel) was the lawyer and that he would make the call on whether or not Petitioner would testify because he had the experience and knew

what he was doing. Ultimately, at trial, defense counsel told Petitioner that it wasn't necessary for him to testify and that he would not call Petitioner to testify. Thus, Petitioner was never called to testify at trial.

The reasons Petitioner wished to testify are(1) he wished to testify and refute the time line testimony of the state's witnesses, and in support of the defense time line argument and position; (2) he wished to, and would have, testify about the unrecorded interview with law enforcement and would have adamantly denied making any statement to law enforcement that placed himself at the scene at the time of the 911 call (as claimed by a state's witness); wanted to testify, and would have testified, that Robert Money worked for him, had been in Petitioner's home several times and know where money and a .22 caliber pistol were kept in the home, that Money had worked at the Ates' roadside vegetable stand that day and knew how much money had been taken in and was stored in the home, and that Money was aware that Petitioner and his wife both planned to attend the baccalaureate service at the local baker high school that evening where Petitioner taught, and would have expected their home to be empty at the time of Mrs. Ates' murder (also, see, Point I, supra); and

(3) Petitioner wanted to testify, and would have testified, that he did not kill his wife, and would never have done anything to harm her under any circumstances. However, defense counsel refused Petitioner's repeated and consistent requests to be allowed to testify in his own behalf at trial.

At the state court evidentiary hearing held as part of the postconviction proceeding, defense counsel Drew Pinkerton testified that he had no recollection of how the decision of whether or not Petitioner would testify came about and did not recall if he ever told Petitioner that he needed to testify or didn't need to testify. (EHR-a53). In fact, Mr. Pinkerton testified that he had been furnished with a copy of the record, but candidly admitted that he had virtually no independent recollection of anything pertaining to the case or the trial. (EHR-56). However, Mr. Pinkerton did acknowledge that the time line was the most important and critical part of both the state's case and the defense case (EHR-59-60). Petitioner's other trial attorney, Jr. LaDon Dewrell, was called as a witness at the evidentiary hearing and testified Petitioner made the decision not to testify. However, Mr. Dewrell did admit that Petitioner had ... "stated his desire to testify early on in the trial." (EHR-88). Further,

Mr. Dewrell admitted that Petitioner's wife, Glenda Ates, was present and took place in the discussion about whether Petitioner would testify. (EHR-88). Mr. Dewrell also stated emphatically that the time line was the key issue in the case. (EHR-91). Mr. Dewrell conceded that Petitioner "always before ... wanted to testify. He wanted to tell his story to the jury," but that they "talked and talked" until it was decided he would not testify. (EHR-99); and also conceded that "I was his lawyer and that's what I was telling him [not to testify]." (EHR-99).

Also at the state court evidentiary hearing, Glenda Ates, Patricia Ates, Luther Ates, and Petitioner all testified that Petitioner maintained throughout the trial that he wanted to testify, that he told his lawyers he wanted to testify, but that Mr. Dewrell, the lead defense counsel told Petitioner that he was the lawyer and that it was his decision that Petitioner would *not* testify. Glenda Ates, Patricia Ates and Luther Ates all testified that they were present at several conferences between Petitioner and his lawyers where Petitioner expressed his wish to testify at trial, but that neither attorney told Petitioner at those conferences that he had a right to testify or that it was his decision alone whether to take the stand in his own behalf.

Petitioner testified to the same facts. (EHR-101-181).

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Supreme Court expressly recognized that constitutional basis of the right of a criminal defendant to testify in his own behalf, and declared that the right "is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Id.*, at 51 (quoting *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975). The Supreme Court also held that the right to testify is derived from several constitutional provisions, including the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, the Sixth Amendment Right to self-representation, and as a corollary to the Fifth Amendment privilege against self-incrimination. Further, the Court acknowledged that "[o]n numerous occasions the Court has proceeded on the premise that the right to testify on one's's own behalf in defense to a criminal charge is a fundamental right." *Id.*, at 51 n.10.

A criminal Defendant's right to testify is fundamental in nature and therefore may only be waived personally by the Defendant. *See, Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating that "the accused has the ultimate authority to make certain

fundamental decisions regarding the case, as to whether plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."). Further, a right that is fundamental and personal to the Defendant may only be waived if there is evidence in the record demonstrating "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It must be so held because "[s]ilent acquiescence is not enough." *Nixon v. Singletary*, 758 So. 2d 618, 624 (Fla. 2000) *reversed on other grounds, Florida v. Nixon*, 543 U.S. 175 (2004).

In the instant case, the record shows that Petitioner never made an informed, intelligent decision to waive his constitutional right. Petitioner continually told defense counsel that he wanted to testify, but counsel told him "no." There was never a waiver by Petitioner of his right to testify.

It is undisputed that the record does not contain any such purported "waiver" by Petitioner of his right to testify. The record also does not show that trial defense counsel, the trial judge, or anyone else, ever explained to Petitioner that the decision on whether or not to testify was his alone and that his right to testify could not be waived by defense counsel. In this case, where Petitioner was on

trial charged with first-degree murder, it is unconscionable that no one in authority (neither defense counsel, trial judge, or prosecutor) deemed it necessary to make an on-the-record inquiry of Petitioner regarding his constitutionally guaranteed right to testify.

Thus, but for defense counsel's errors in this regard, there exists a reasonable probability that the outcome of the proceedings would have been different, such as to undermine confidence in the trial proceedings and result thereof. In the alternative Petitioner/Appellant Ates plead that the state trial court judge had the affirmative duty to create the record of the defendant being advised of his right and waiving that right to testify.

b. Ineffective assistance of counsel in failing to object and constitutional prosecutorial misconduct.

During closing arguments to the jury, the special prosecutor, Rod Smith,[2] made numerous misstatements of the evidence, made comments not substantiated by the evidence, and made comments designed to demonize Petitioner in the minds of the jury and solicit sympathy for the victim. However, at no point did defense counsel

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[2]Later a State Senator and now an announced candidate for Governor of the State of Florida.

object to this grossly prejudicial prosecutorial misconduct, nor did he move for mistrial.

The prosecutor misstated the evidence purposely to infer that Petitioner's relationship with Glenda Ates served as the motive to commit the charged offense. The prosecutor argued to the jury that Glenda Ates was seventeen years of age and was at a high school Baccalaureate service where Petitioner Ates was also a faculty member, on the evening the crime occurred. (R-XX-1612). However, no record evidence exists concerning her age or whereabouts at that time. The prosecutor falsely told the jury that Petitioner and Glenda Ates were living together "less than ten months" after the crime, and that they were engaged by the fall of 1991. (R-XX-1612-1613). However, the trial testimony was that Glenda Ates began living with Petitioner in September of 1992, which was sixteen months after the death of Petitioner's wife (R-XVII - 1188), and there was no evidence at trial that the two were ever "engaged." These comments and misstatements of fact were designed to evoke an emotional response from the jury and prejudice Petitioner by inferring that he was engaged in an illicit sexual relationship with Glenda Ates at the time of the charged offense.

On two separate occasions, State Attorney Smith improperly commented, without objection from defense counsel, on Petitioner's Fourth and Fifth Amendment rights. First, he told the jury that Deputy Tommy Carmichael went to the hospital following the fire (when Petitioner arrived at the scene and discovered that his wife had been found dead inside the residence, he broke down emotionally and finally collapsed and had to be transported to the hospital, where doctors admitted him.) He asked Petitioner's brother, Luther Ates, an area banker, for Petitioner's clothing, and Luther Ates refused to provide Carmichael with the clothing without a search warrant. (R-XIV-1557). Luther Ates steadfastly denied that any such encounter with Carmichael ever took place; and, indeed, family members, other than Luther Ates, picked up the clothing the following day from hospital personnel who had stored the clothing at the hospital; and hospital personnel involved all stated that Deputy Carmichael never asked them for Petitioner's clothing or otherwise inquired about same.)

This comment by Prosecutor Smith to the jury was highly prejudicial because it implied that the State had some knowledge that Petitioner's clothing contained some type of evidence which Luther

Ates was trying to hide to protect Petitioner and thus inferred guilt.

Prosecutor Smith told the jury that during an interview with law enforcement Petitioner didn't "want to talk anymore" after being informed that a 911 call had been made from the scene. (R-XIV-1582). This unobjected to comment was purposeful prosecutorial misconduct which impinged upon Petitioner's Fifth Amendment right to remain silent, and prejudiced Petitioner by further making it appear to the jury that Petitioner was hiding something, thereby implying guilt. On both instances where Smith made these improper comments related to Petitioner's constitutional rights, defense counsel had an affirmative duty to lodge a timely objection in order to, at a minimum, preserve the points for appeal. Thus, Petitioner was severely prejudiced by defense counsel's failure to object to these comments to the jury by Prosecutor Smith.

Prosecutor Smith then invited the jury to improperly speculate as to possible motives for the murder of his wife by telling the jury that perhaps Petitioner's motive was that he wanted to date a high school girl, avoid divorce, keep his farm, and collect insurance. (R-XX-1612-1613). However, there was absolutely no evidence adduced at trial as to any of these purported "motives," and

such comments to the jury were clearly improper and highly prejudicial absent any record evidence to support such allegations. Smith also improperly implied to the jury that it was their "duty" to "society" to convict Petitioner. Smith's message was clear and implicit and, lacking evidentiary support, required defense counsel to object in a timely manner in order to, at a minimum, preserve the points for appeal, as the comments were clearly prejudicial to Petitioner and deprived him of a fair trial and due process of law.

Smith improperly attacked defense counsel by telling the jury that "hopefully" defense counsel "confused you on their part;" and improperly invoked religion on behalf of the victim to provoke the passions and prejudices of the jury. (R-XX-1714; 1624-1625, respectively). Smith also improperly told the jury that law enforcement had offered to administer to Petitioner a polygraph examination but that Petitioner didn't take them up on the offer, (R-XX-1727), thus further implying that Petitioner had something to hide regarding his wife's death. Again, again, and again, defense counsel failed to lodge objections to these instances of prosecutorial misconduct, and therefore failed to protect Petitioner's constitutional rights to a fair trial and due process of law.

The cumulative effect of defense counsel's failure to object to the blatant prosecutorial misconduct shown above cannot be discounted or underestimated, and the resultant prejudice is glaringly obvious. Defense counsel also failed to object to Smith's repeated denigration of the defense, defense counsel, and defense witnesses by repeatedly using the descriptive words "absurd," "preposterous," and "ridiculous," and the terms "red herring" and "smoke screen." (R-XX-1617, 1620, 1621, 1625, 1627, 1633, 1709, 1711, 1714, 1715, 1720, 1724). Prosecutorial conduct substantially prejudiced Petitioner, and deprived him of a fair trial and due process of law; and defense counsel's failure to timely object to same further prejudiced Petitioner. Further, defense counsel's failure to object to such blatant misconduct cannot be explained or justified by any reasonable strategic or tactical decision or objective. Had defense counsel lodged timely objections to these numerous instances of prosecutorial misconduct, the trial judge would have been obligated by law to declare a mistrial if defense counsel had so moved; at a bare minimum, the judge would have been required to strongly admonish prosecutor Smith and give the jury corrective instructions.

In *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 297 (1986), the Supreme Court held that habeas petitioner's have the right to raise ineffective assistance of counsel claims based in whole or in part on counsel's procedural default. Further, a state prisoner seeking habeas relief in federal court because of the denial of effective assistance of counsel is not required to make a showing of some chance of relief on appeal. *Bonds v. Wainwright*, 564 F.2d 1125 (5th Cir. 1977). And defense counsel's failure to preserve issues for direct appeal constitutes ineffective assistance of counsel. *See, Government of Virgin Islands v. Forte*, 865 F.2d 59 (3d Cir. 1989); *Hawkins v. Lynaugh*, 862 F.2d 482 (5th Cir. 1988); *Vela v. Estelle*, 708 F.2d 954 (5th Cir. 1983).

The failure to object to inflammatory remarks made by a prosecutor during closing arguments to a jury constitutes ineffective assistance of counsel. *United States v. Rusmisel*, 716 F.2d 301 (5th Cir. 1983). *See also, Weygandt v. Ducharme*, 774 F.2d 1491 (9th Cir. 1985)(defense counsel's failure to object to improper closing remarks by prosecutor amounted to performance below the objective standard of reasonableness).

The instant case involved over twenty-four individual,

objectionable, improper remarks and misstatements by the prosecutor during closing arguments, and defense counsel failed to object, failed to move for mistrial, and failed to ask for curative instructions.

c. Constitutional prosecutorial misconduct and prejudicial closing argument.

On two separate occasions during closing argument, the prosecutor improperly implied to the jury that it was their duty to convict Petitioner. The first instance was during the opening portion of his closing argument, where he told the jury that "Jimmy Ates did this. You've been sworn as jurors to reach a verdict. He did it. He killed her like that. He left her laying like that and he's guilty of first degree murder and the state asks you to do your duty, go back, consider the evidence, weigh the evidence, weigh the absurd comment he made, weigh the absurd contention they come up with in terms of someone else, weigh all of that and come back and deliver a message loud and clear, Jimmy Ates, you are a killer, you killed you wife and its first degree murder." (R-XX-1627).

Then, at the conclusion of his summation, the prosecutor again asserted to the jury that it was their duty to convict Petitioner, stating:

> Folks, this is the hardest decision people are ever asked to do in their society. *Duty is a tough thing. Duty is imposed on you because people you can carry it out and your duty in this place is real simple.* Its to listen to the instructions, to look at all the evidence and all that evidence to the law and when you are through the state has every confidence that *you will come back and say Jimmy Ates, after all these years, is guilty of the murder of his wife, Norma Jean. Nobody else is. You can't pin it elsewhere. You can't point someone -- you can't find a patsy much as you try all those things Jimmy Ates was the man in the house. It's his gun, his car and he's the killer.* Thank you. (R-XX-1733-1734).

The court in *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986), stated emphatically that "[t]here should be no suggestion that a jury has a duty to decide one way or the other, such an appeal is designed to stir passion and can only distract the jury from its actual duty: impartiality."

In a Florida case, *Reddish v. State*, 525 So. 2d 928 (Fla. 1st DCA 1988), the court considered a comment from a prosecutor who stated in closing argument: "Gentlemen, if you succumb to the defense argument, you would be in violation of your oath as jurors." *Id.*, at 525 So.2d at 929. In the *Reddish* court's view, this comment contributed "an improper attempt by the prosecution to instruct the jury s to its duties and functions." *Id.*, 525 So. 2d at 930. The

Reddish court based its findings on *Mandelbaum, supra*, and several other federal cases.

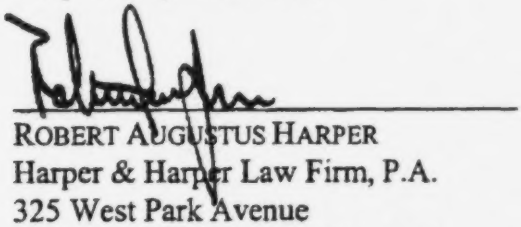
The due process clause of the Amendments of the United States Constitution, requires that Petitioner be afforded a fair and impartial trial, and to have his guilt or innocence determined by a jury uncontaminated by improper prosecutorial comments such as those complained of above. Thus, Petitioner has stated a substantial constitutional claim of prejudicial prosecutorial misconduct.

I. CONCLUSION

Based on the foregoing facts and authorities, Petitioner contends that under United States Supreme Court precedent the Petition should have been considered timely and the Certificate of Appealability sought in the Eleventh Circuit Court of Appeals should have been granted. Numerous allegations of errors and omissions of trial counsel the right to testify, failing to object, failing to move for mistrial, failing to move for curative instructions, (over twenty-four times), and the prosecutor's misstatements of the evidence and comments on evidentiary matters not supported by the evidence at trial, deprived Petitioner of his due process right to a fair trial and effective assistance of counsel, fairly stated constitutional claims.

The merits of the claims are not at issue as a matter of law. The Petitioner timely stated sufficient federal constitutional claims which should be considered on their merits by the United States District Court. The prayed Certificate of Appealability should have issued. All appropriate relief is hereby requested.

Respectfully submitted,



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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

JIMMY L. ATES,
Petitioner,

v.

JAMES McDONOUGH, Secretary,
Department of Corrections, State of Florida,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

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[Case 3:05-cv-00057 MCR-EMT]
[Document 21 Filed 09/12/2005]

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JIMMY L. ATES,
Petitioner,

vs. Case No.: 3:05cv57/MCR/EMT

JAMES V. CROSBY,
Respondent.
_____/

REPORT AND RECOMMENDATION

Petitioner, represented by counsel, initiated this action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Doc. 1). Respondent filed a motion to dismiss the petition as untimely (Doc. 18). Petitioner filed a response in opposition to the motion (Doc. 20). This matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(b). After careful consideration, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter. It is further the opinion of the undersigned that the pleadings and attachments before

the court show that the petition should be dismissed as untimely.

Following a jury trial in the Circuit Court for Okaloosa County, Florida, Petitioner was convicted of first degree murder (Doc. 1 at 1). On February 2, 1999, he was sentenced to life imprisonment (*id.*). Petitioner appealed his conviction and sentence to the Florida First District Court of Appeal ("First DCA"). On July 31, 2000, the First DCA affirmed the conviction and sentence per curiam, with the mandate issuing August 16, 2000 (*id.* At 2; Doc. 18, Exs. A, B). Ates v. State, 768 So. 2d 446 (Fla. 1st DCA 2000)(Table). Petitioner did not seek certiorari review by the Florida Supreme Court or the United States Supreme Court (Doc. 1 at 2-3).

On July 31, 2001, Petitioner filed a motion for postconviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure (Doc. 1 at 2-3; Doc. 18, Ex. C). The state trial court denied the motion on June 23, 2003 (Doc. 1 at 3). Petitioner appealed the denial to the Florida First DCA, and the appellate court affirmed per curiam on September 15, 2004, with the mandate issuing November 8, 2004 (Doc. 1 at 3; Doc. 18, Ex. D). Ates v. State, 884 So. 2d 384 (Fla. 1st DCA 2005) (Table); *see also* Ates v. State, Case No. 1D03-3613, online docket at www.1dca.org.

Petitioner filed the instant habeas action on February 22, 2005 (Doc. 1 at 1; Doc. 20 at 2).

Pursuant to the requirements set forth in 28 U.S.C. § 2244, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, which became effective on April 24, 1996, a one year period of limitation applies to the filing of a habeas petition by a person in custody pursuant to a state court judgment. The limitation period runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(1).

In the instant case, Petitioner does not assert that a government-created impediment to his filing existed, that he bases any of his claims on a right newly recognized by the Supreme Court, or that the facts supporting his claims could not have been discovered through the exercise of due diligence before the filing of this petition.

Thus, the statute of limitations must be measured from the remaining statutory trigger, which is the date on which his conviction became final. *See* 28 U.S.C. § 2244(d)(1).

It is not well established that when a Florida defendant directly appeals his conviction but does not seek certiorari review of the decision affirming the conviction, the one-year limitations period for filing a federal habeas petition begins to run ninety (90) days after issuance of the appellate court's decision.[3] Nix v. Secretary for the Dep't of Corrections, 393 F.3d 1235, 1236-37 (11th Cir. 2004)(citing Bond v. Moore, 309 F.3d 770 (11th Cir. 2002)); Jackson v. Secretary for the Dep't of Corrections, 292 F.3d 1347, 1349 (11th Cir. 2002); *accord* Clay v. United States, 537 U.S. 522, 525, 123 S.Ct. 1072, 1075, 155 L.Ed.2d 88 (2003); Close v. United States, 336 F.3d 1283, 1284-85 (11th Cir. 2003). In the instant case, the First DCA issued its decision affirming Petitioner's conviction on July 31, 2000, upon expiration of the 90-day period for seeking certiorari review.

This court must next address whether the limitations period

---

[3]The 90-day period for filing in the United States Supreme Court a petition for writ of certiorari seeking review of a decision of a state appellate court runs from the date of the state court's opinion. *See* Sup. Ct. R. 13.3.

was tolled pursuant to statutory or equitable tolling principles.

Section 2244(d)(2) provides:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The parties do not dispute that 274 days of the federal imitations period elapsed between the date Petitioner's conviction became final and the date he filed his Rule 3.850 motion (*see* Doc. 20 at 7). The issue in this case is the period of time the Rule 3.850 motion was "pending" for purposes of section 2244(d)(2). Respondent argues the motion was pending until November 8, 2004, the date of issuance of the mandate of the appellate court's decision affirming the trial court's decision denying the motion (*see* Doc. 18 at 5). Petitioner concedes that the Eleventh Circuit Court of Appeals has held that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of the federal limitations period (*see* Doc. 20 at 3, citing Steed v. Head, 210 F.3d 1298 (11th Cir. 2000; Coates v. Byrd, 211 F.3d 1225 (11th Cir. 2000)); however, Petitioner urges this Court to adopt the reasoning of a post-Coates 2003 decision of the Sixth Circuit Court of Appeals which held that the federal limitations is tolled during the period in

which a petitioner may seek certiorari review of the denial of a petitioner's state motion for collateral relief (*see* Doc. 20 at 3-4, citing Abela v. Martin, 348 F.3d 164 (6th Cir. 2003)). In light of the Eleventh Circuit's recent affirmance of the holding in Coates, *see* Lawrence v. Florida, No. 04-15435, 2005 WL2055875, at *4 (11th Cir. Aug. 26, 2005), this Court rejects Petitioner's argument. For purposes of section 2244(d)(2), Petitioner's state postconviction motion was pending from July 31, 2001, until November 8, 2004, the date of the appellate court mandate affirming the trial court decision which denied Petitioner's postconviction motion. The federal limitations period then ran from November 9, 2004, until February 22, 2005, the date Petitioner filed his federal habeas petition, for a total of 106 days. Thus, Petitioner exceeded the one-year limitations period by fifteen (15) days (274 days + 106 days = 380 days).

Petitioner does not claim he is entitled to equitable tolling of the limitations period. Moreover, he does not assert he is actually innocent of the crime for which he was convicted. Therefore, this Court concludes that the instant petition should be dismissed as untimely pursuant to 28 U.S.C. § 2244(d).

Accordingly, it is respectfully **RECOMMENDED:**

1. That Respondent's Motion to Dismiss (Doc. 18) be **GRANTED.**

2. That the petition for writ of habeas corpus (Doc. 1) be **DISMISSED** with prejudice as untimely.

At Pensacola this 12th day of September, 2005.

/s/ Elizabeth M. Timothy
ELIZABETH M. TIMOTHY
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations may be filed within ten (10) days after being served a copy thereof. A copy of objections shall be served upon the magistrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988).

[Case 3:05-cv-00057 MCR-EMT Document 23]
[filed 10/13/2005 Page 1 of 1]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JIMMY L. ATES

VS CASE NO. 3:05cv57/MCR/EMT

JAMES V. CROSBY

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petitioner take nothing and that this action be DISMISSED with prejudice as untimely.

WILLIAM M. McCOOL, CLERK OF COURT

October 13, 2005 /s/ Teresa Cole
DATE Deputy Clerk: Teresa Cole

[FILED]
[U.S. COURT OF APPEALS]
[ELEVENTH CIRCUIT]
[JAN 12 2006]
[THOMAS K. KAHN]
[CLERK]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15934-G

JIMMY L. ATES,

Petitioner-Appellant,

versus

JAMES V. CROSBY, Secretary
Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Florida

ORDER:

Appellant moves for a certificate of appealability to appeal the dismissal of his 28 U.S.C. § 2254 petition as time-barred. Appellant's conviction became final on or about October 30, 2000,

90 days after his conviction was affirmed on appeal. Bond v. Moore, 309 F.3d 770, 774 (11th Cir. 2002). He did not file a state post-conviction motion until July 31, 2001, approximately 274 days after the one-year statute of limitations began to run. Appellant's state post-conviction motion was finally denied on November 8, 2004. Thus, he had until on or about February 7, 2005, to file his § 2254 petition, but he failed to do so until February 22, 2005. Accordingly, the district court properly determined that appellant's § 2254 petition was time-barred. 28 U.S.C. § 2244(d)(1).

Although appellant alleges that the limitations period should be tolled during the period in which he could have sought certiorari review from the U.S. Supreme Court regarding the denial of his state post-conviction motion, this Court has expressly rejected that argument. See Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005).

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues he seeks to raise. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because his petition is plainly barred by § 2254's one-year statute of limitations, and he is not entitled to statutory or equitable tolling, appellant has failed to

satisfy the second prong of Slack's test. The motion for a certificate of appealability is DENIED.

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

[FILED]
[U.S. COURT OF APPEALS]
[ELEVENTH CIRCUIT]
[FEB 21 2006]
[THOMAS K. KAHN]
[CLERK]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-15934-G

JIMMY L. ATES,

Petitioner-Appellant,

versus

JAMES V. CROSBY, Secretary
Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Florida

Before DUBINA and HULL, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated January 12, 2006. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED

because appellant has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000); Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005).

(2)

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1593

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY L. ATES

Petitioner,

vs.

JAMES R. MCDONOUGH, etc.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

QUESTION PRESENTED (restated)

Whether, under 28 U.S.C. §2244(d)(2), a state prisoner is entitled to tolling of the one-year limitation period during the time that a petition for writ of certiorari could have been filed following completion of collateral proceedings in the state court?

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No. 05-1593

IN THE SUPREME COURT OF THE UNITED STATES

JIMMY L. ATES,
Petitioner,

vs.

JAMES R. MCDONOUGH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

OPINION BELOW

Petitioner, Jimmy L. Ates, seeks review of the January 10, 2006, order of the United States Court of Appeals for the Eleventh Circuit denying his request for a certificate of appealability. Rehearing was denied February 21, 2006.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1254(1), of a unpublished decision of the Eleventh Circuit filed on January 12, 2006, which denied a certificate of appealability. This Court has jurisdiction.

In order to obtain review under 28 U.S.C. §1254(1), Petitioner must show that the Eleventh Circuit was presented and passed on the questions raised in his petition. Campbell v. Louisiana, 523 U.S. 392, 118 S. Ct. 1419, 140 L.Ed.2d 551 (1998),

City of Springfield v. Kibbe, 480 U.S. 257, 107 S.Ct. 114, 94 L.Ed.2d 293 (1987).

In his request for a certificate of appealability to the Eleventh Circuit he argued that the timeliness ruling was wrong . The Eleventh Circuit denied a certificate of appealability. In doing so, the Eleventh Circuit stated,

> Although the appellant alleges that the limitations period should be tolled during the period in which he could have sought certiorari review from the U.S. Supreme Court regarding the denial of his state post-conviction motion, this Court has expressly rejected that argument. See Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005).

The Court then went on to hold that the Petitioner had failed to meet the second prong of the test set out in Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1596, 1600-01, 146 L.Ed.2d 542 (2000), namely that reasonable jurists would find debatable the procedural issue the Petitioner sought to raise. (Opinion, Appendix two, Petitioner's brief).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the statutory provision implicated in this case.

STATEMENT OF THE CASE AND FACTS

On September 23, 1998, a state court jury found the Petitioner guilty of first degree murder. The Petitioner was sentenced to life. The Florida First District Court of Appeal affirmed the judgment and sentence *per curiam* without an opinion, on July 31, 2000. See Ates v. State, 768 So.2d 446 (Fla. 1st DCA 2000). The mandate issued on August 16, 2000. Subsequently the Petitioner filed a motion for postconviction relief pursuant to

Florida Rule of Criminal Procedure 3.850 on July 31, 2001. The state trial court denied the motion. The Florida First District Court of Appeal affirmed the denial of the motion *per curiam* without an opinion, with the mandate issuing on November 8, 2004.

The Petitioner then filed a federal habeas petition pursuant to 28 U.S.C. §2254 on February 22, 2005. The Respondent moved to dismiss the petition on the ground that it was untimely under 28 U.S.C. §2244(d), and alleged that a total of 380 untolled days expired from the date the direct appeal judgment became final by the expiration of the time to file a petition with this court and the filing of the petitioner's petition for writ of habeas corpus. The magistrate agreed, and recommended in his Report and Recommendation that the petition be dismissed (Doc 21). The Federal District Court Judge adopted the report and recommendation (Doc 22).

The Petitioner then sought a Certificate of Appealability from the Eleventh Circuit Court of Appeals. In his request for a certificate of appealability, he asserted that reasonable jurists would find debatable whether he was entitled to statutory tolling during the 90 day period for seeking certiorari from the denial of his state postconviction motion and that reasonable jurists would find debatable several issues concerning the merits of his habeas petition.

The Court of Appeals denied the motion. In so doing, the Court stated,

> Although appellant alleges that the limitations period should be tolled during the period in which he could have sought certiorari review from the U.S. Supreme Court regarding the denial of his state post-conviction motion, this Court has expressly rejected that argument. See Lawrence v. Florida, 421 F.3d 1221, 1225 (11th Cir. 2005).

To merit a certificate of appealability, appellant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues he seeks to raise. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000). Because his petition is plainly barred by § 2254's one-year statute of limitations, and he is not entitled to statutory or equitable tolling, appellant has failed to satisfy the second prong of Slack's test. (Pet. Apx. A-3)

REASONS FOR DENYING THE WRIT

The time in which certiorari can be sought from the denial of state postconviction relief is not subject to tolling under §2244(d)(2), which exists for the purpose of permitting exhaustion of state court remedies. The statutory language is clear, and there is no reason why this Court should grant the petition merely to restate that which is set out in the statute.

In this petition for a writ of certiorari, the Petitioner contends that this Court should grant review of the unpublished decision of the Eleventh Circuit denying a certificate of appealability as the decision resolved an important question of federal constitutional law. The Respondent disagrees and urges this Court to deny review.

Petitioner contends that this Court should grant certiorari review on the issue of whether the time during which a petitioner could seek a writ of certiorari from a state collateral proceeding is included under 28 U.S.C. §2244(d)(2), relying on the decision of the Sixth Circuit Court of Appeals in Abela v. Martin, 348 F.3d 164 (6th Cir. 2003), *cert. denied*, 541 U.S. 1070 (2004).

The starting point for certiorari analysis is United States Supreme Court Rule Ten, which provides that certiorari will be granted only for compelling reasons. The fact that one circuit in one case misinterpreted this Court's holdings in Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), and Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), is not a basis to grant certiorari when the facts are significantly different.

Pursuant to §2244(d)(2), "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is

pending shall not be counted toward any period of limitation under this subsection." In Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002), this Court held that "an application is pending as long as the ordinary *state collateral review process* is 'in continuance'--i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution *through the State's post-conviction procedures*, by definition it remains 'pending.'" Id. at 219-220, 122 S.Ct. at 2138 (emphasis added). Tolling under §2244(d)(2) serves the purpose of permitting a state prisoner to exhaust his state court remedies, a requirement under §2254(b). Exhaustion does not, however, require that a state prisoner seek discretionary review from this Court. In comparison, relative to the direct appeal of the judgment of a conviction and sentence, the time that a petition for certiorari is pending or the ninety-day period for seeking such review is relevant under §2244(d), because under the unique language of that section, (expiration of the time for seeking such review) it determines when a conviction or a sentence, or both, become final. Caspari v. Bohlen, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236(1994). Section 2244(d) on the other hand tolls while state post conviction actions are pending. Petitioner did not seek certiorari and had nothing pending so as to activate any tolling provision.

The Eleventh Circuit's case law is consistent with those principles, Coates v. Byrd, 211 F.3d 1225, 1227, as are nearly all of the other circuit courts of appeals. See, e.g., Stokes v. District Attorney of Philadelphia, 247 F.3d 539, 542 (3rd Cir.), cert. denied, 534 U.S. 959 (2001); Crawley v. Catoe, 257 F.3d 395, 398-401 (4th Cir. 2001), cert. denied, 534 U.S. 1080 (2002); Ott v. Johnson, 192 F.3d 510, 512-513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); Gutierrez v. Schomig, 233 F.3d 490, 491-492 (7th Cir. 2000), cert. denied, 532 U.S. 950 (2001); Snow v. Ault, 238 F.3d 1033, 1035-1036 (8th Cir.), cert. denied, 532 U.S. 998 (2001); Rhine v. Boone, 182 F.3d 1153, 1155-1156 (10th Cir. 1999), cert. denied, 528 U.S. 1084 (2000). The fact that the Sixth Circuit reached a different result, *compare* Abela, 348 F.3d at 172-173, does not provide a basis for granting certiorari review in this case.

Additionally, petitioner does not present a case where he had anything pending after the denial of state post conviction relief, thus under Carey v. Saffold, 536 U.S. 214 (2002), there is no basis for granting relief.

The conclusion reached by the vast majority of appellate courts is mandated by the plain statutory language in 28 U.S.C. §2244(d). A comparison of the language contained in Section 2244(d)(1) and §2244(d)(2) shows distinct differences. §2244(d)(1)(a) provides,

> (d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review

By contrast, §2244(d)(2) provides

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In Duncan v. Walker, 533 U.S. 167, 121 S Ct. 2120, 150 LEd.2d 251 (2001), this Court held that a federal petition for writ of habeas corpus did not toll the 1-year period set out in Section 2244(d)(1), because it was not a "pending" "state" post-conviction proceeding. This Court noted that one must begin with the statute's language. 533 U.S. at 172, 121 S.Ct. at 2124. This Court further observed, "It is our duty 'to give effect, if possible, to every clause and word of a statute.'" 533 U.S. 167, 174.. This Court then said,

> Respondent reads § 2244(d)(2) to apply the word "State" only to the term "post-conviction" and not to the phrase "other collateral." Under this view, a properly filed federal habeas petition tolls the limitation period. Petitioner contends that the word "State" applies to the entire phrase "post-conviction or other collateral review." Under this view, a properly filed federal habeas petition does not toll the limitation period.
>
> We believe that petitioner's interpretation of § 2244(d)(2) is correct for several reasons. To begin with, Congress placed the word "State" before "post-conviction or other collateral review" without specifically naming any kind of "Federal" review. The essence of respondent's position is that Congress used the phrase "other collateral review" to incorporate federal habeas petitions into the class of applications for review that toll the limitation period. But a comparison of the text of § 2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of § 2244(d)(2), Congress would have mentioned "Federal" review expressly. In several other portions of AEDPA, Congress specifically used both the words "State" and "Federal" to denote state and federal proceedings.

Finally, this Court said,

> "Section 2244(d)(2), by contrast, employs the word "State," but not the word "Federal," as a modifier for "review." It is well settled that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

> intentionally and purposely in the disparate inclusion or exclusion.'" 533 U.S. 167, 173, 121 S. Ct. 2120, 2125.

In Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir. 1999), the Tenth Circuit Court of Appeals applied similar reasoning to conclude that congress never intended that the 90-day period to seek certiorari in this court should apply from state postconviction proceedings to toll the 1-year limitations period. There, the court said,

> The state post-conviction proceeding is final after the state's highest court has addressed the application. Exhaustion of state remedies, which is a pre-condition to the ability to petition for a writ of habeas corpus, does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court. [Citations omitted] The tolling provision specifically refers to a properly filed application for "State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). We are satisfied that, in the wording of § 2244(d)(2), "State" modifies the phrase "post-conviction review" and the phrase "other collateral review." A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review.

The Eleventh Circuit Court of Appeals specifically adopted this reasoning in Coates v. Byrd, 211 F.3d 1225, 1226-1227 (11th Cir. 2000), the holding of which was reiterated in Lawrence v. Florida,

421 F.3d 122[illegible], 1225 (11th Cir. 2005), which is now pending review before this Court.

It is significant to observe that in Abela v. Martin, *supra*., p. 5, and Lawrence the defendant actually filed a petition for writ of certiorari with this Court to review the denial of his state post-conviction proceeding. In this case, the petitioner did not file with this Court for review. Thus, while it is conceivable to argue that in Abela and Lawrence the defendant at least had *something* pending, albeit nothing in the state courts, in this case the petitioner had **nothing** pending during the 90-day period. Therefore there is no basis upon which he can reasonably expect to be given the benefit of an additional 90 days that it is clear Congress never intended.

These holdings are the logical extension of the rule expressed in Duncan v. Walker, *supra*. In §2244(d)(1), the statute talks in terms of when a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review. This contemplates **all** review, including the potential for review by this Court. However, §2244(d)(2) does not mention finality or the time for seeking review. Rather, it talks solely in terms of the time during which a "state" post-conviction proceeding is "pending." Consistent with the reasoning in Walker, if Congress had intended to include the 90-day period for seeking review in this Court after the ultimate denial of a state post-conviction proceeding, then Congress would have said so. Either it would have used language similar to that used in §2244(d)(1), or it would have expressly including the certiorari time period. It did neither. Instead, Congress specifically limited the tolling procedures to be those involved in the **state** court post-conviction proceedings. Obviously seeking certiorari review in this Court is not a **state** post-conviction proceeding. For this Court to rule otherwise, this Court would have to recede from its holding in Walker; and, since Walker is grounded on sound logic, this Court should maintain its integrity.

The majority of the appellate courts have interpreted the statute correctly. Only state court proceedings toll the 1-year

limitations period. Seeking review in this Court is not a state court proceeding, so it does not toll the 1-year limitations period under §2244(d)(2). For that reason, the court below correctly ruled that a certificate of appealability should not issue. Because the Eleventh Circuit facts in this case differ from those in Abela and Lawrence, this Court should deny the petition.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully Submitted,

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Case No. 05-1593

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005

JIMMY L. ATES,
Petitioner,

v.

JAMES McDONOUGH, Secretary,
Department of Corrections, State of Florida,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

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PETITIONER'S REPLY TO STATE'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO STATE'S BRIEF IN OPPOSITION

The United States Supreme Court has granted certiorari in *Lawrence v. Florida,* case no. 05-8820, which case arises from the same circuit as the petition now pending and presents the same issue presented as the petition herein, namely whether the one year statute of limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 is tolled during the pendency of a petition for writ of certiorari to the United States Supreme Court.

Petitioner Ates has argued that the conflicts among the circuits must now be addressed and resolved by the Supreme Court of the United States. A brief legal history is illustrative.

In *Rhine v. Boone,* 182 F.3d 1153 (10th Cir.1999), the Tenth Circuit was faced with the issue of whether the actual filing of a petition for a writ of certiorari in the United States Supreme Court following the denial of collateral relief in the state courts tolled the running of the statute of limitations. The Tenth Circuit looked to the language of 28 U.S.C. § 2244(d)(2), which is the provision applicable to tolling during state collateral proceedings, and contrasted it with the language of section 2244(d)(1), which is the provision applicable to tolling during direct appeal. *Id.* at 1155-56. and concluded the one-year time limitation did not include the additional ninety days to petition the United States Supreme Court on federal habeas petitions filed by state prisoners. *Rhine v. Boone, supra*, 182 F.3d at 11555-56.

The Fifth Circuit reached the same conclusion on this

issue as did the Tenth Circuit, and for the same reasons. *See Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir.1999). The Eleventh Circuit agreed with the Tenth and Fifth Circuits that the time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, was not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes. *Coates v. Byrd,* 211 F.3d 1225 (11th Cir. 2000); *Lawrence v. State of Florida,* 421 F.3d 1221 (11th Cir. 2005), certiorari granted --- U.S. ---, 126 S.Ct. 1625 (Case No. 05-8820).

A related issue addressed by several circuits is whether actual petitioning for certiorari on the underlying conviction is required in order to extend the one year limitations period. *Clay v. United States*, 123 S. Ct. 1072, 1075, 537 U.S. 522, 155 L. Ed. 2d 88 (2003), offers a compelling logic. In *Clay*, the Court determined that a federal criminal conviction becomes final, for the purposes of calculating the one-year time period within which to move to vacate pursuant to 28 U.S.C. § 2255

when the time expires for filing a petition for certiorari to contest the federal appellate court's affirmance of conviction.

The Tenth Circuit has concluded, however, that section 2244(d)(2) does not toll the limitations period where the petitioner had actually sought certiorari in the Supreme Court. *Rhine*, 182 F.3d at 1156. The Fourth Circuit agreed where the petitioner had actually sought certiorari. *Crawley v. Catoe*, 257 F.3d 395, 399-400 (4th Cir. 2001). Other circuits, relying on *Rhine*, have reached the same conclusion with respect to petitioners who had not actually sought certiorari review. *See Snow v. Ault*, 238 F.3d 1033, 1035 (8th Cir. 2001); *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001); *Coates v. Byrd*, 211 F.3d 1225, 1227(11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *see also Isham v. Randle*, 226 F.3d 691 (6th Cir. 2000).

The Third Circuit has also distinguished situations where certiorari is actually sought from those where it is not. In particular, in 1999, the Third Circuit concluded th... the

limitations period was tolled during the period where a petitioner actually sought certiorari. *See Morris v. Horn*, 187 F.3d 333, 336-37 (3d Cir. 1999). However, subsequent to the decision in *Morris*, the Third Circuit concluded that the ninety-day period for seeking certiorari review in the Supreme Court should not be considered to toll the limitations period under section 2244(d)(2) where the petitioner has not actually sought certiorari. *See Nara v. Frank*, 264 F.3d 310, 318 & n.4 (3d Cir. 2001); *Stokes v. Dist. Attorney of the County of Phila.*, 247 F.3d 539 (3rd Cir. 2001). The distinction relied on the use of the word "pending" in section 2244(d)(2), concluding that where no petition for certiorari is actually filed, nothing can be "pending" under section 2244(d)(2). *Nara*, 264 F.3d at 318. Recently, however, the Third Circuit abandoned this distinction altogether, joining the majority of the circuits. *See Miller v. Dragovich*, 311 F.3d 574 (3d Cir. 2002). The court said, "To avoid *Duncan* we would have to hold that Congress intended to distinguish between the exercise of Supreme Court certiorari

jurisdiction and federal habeas corpus jurisdiction in enacting section 2244(d)(2)." *Id.* at 579.

The Second and Seventh Circuits adopted a narrow version of the approach taken in *Isham*, *Coates*, *Ott*, *Miller*, and *Rhine*, limiting their holdings to a rule that the period during which certiorari may be sought cannot toll the limitations period where certiorari is not actually sought. *See Gutierrez v. Schomig*, 233 F.3d 490, 491-92 (7th Cir. 2000); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001). The Seventh Circuit focused on whether there was any "properly filed" application where the petitioner had not sought certiorari to the United States Supreme Court, concluding that where nothing had been filed, nothing could be "properly filed" under section 2244(d)(2). *Gutierrez*, 233 F.3d at 492. The Seventh Circuit also concluded that where no petition for certiorari had been filed, nothing could be "pending" under section 2244(d)(2). *Id.* Ultimately, however, the Seventh Circuit declined to address whether "State post-conviction" review or "other state collateral

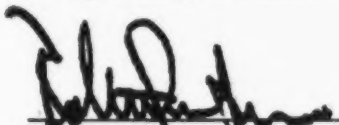
review" may include a "properly filed," "pending" petition for certiorari to the United States Supreme Court. *Id.*

The Second Circuit, likewise faced with a situation where the petitioner had not sought certiorari, adopted the reasoning of the Seventh Circuit, stating, "Our holding is limited to the facts of this case, and we do not reach the questions that would have been raised if a certiorari petition had been properly filed." *Smaldone*, 273 F.3d at 138. The Second and Seventh Circuits continue to distinguish between situations in which a petition for certiorari review of the denial of state habeas relief is actually sought and those cases where it is not.

The circuits need a bright light line definitive resolution of these important questions. The instant petition is not a capital case. The instant petition does not include claims of equitable tolling. *Cf. Lawrence v. Florida, supra.* For reasons stated, it is respectfully submitted the instant petition falls within the category of cases involved in *Lawrence*, presently pending before the Court, with a more streamlined procedural

history. Certiorari review by the Court is necessary to resolve this important legal question which is capable of being oft repeated, and which has split the circuits. All appropriate relief is hereby requested.

Respectfully submitted,



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